Status of a Law Being Challenged while a
Local Referendum is Pending

Staff Presentation to the
Government Operations and
Political Subdivisions Interim Committee
June 23, 2010

This agenda topic is an item from the Master Study Resolution and in last month's survey was prioritized by THIS committee.

Study Item Description

Discrepancy between Statute and Constitution Regarding Local Referendums - to study whether Utah Code Subsection 20A-7-601(3)(b), which appears to conflict with Utah Constitution Article VI, Section (2)(b)(ii) regarding referendums, should be amended.
(Master Study Resolution, study item #81)

The study item reads, "Discrepancy between Statute and Constitution Regarding Local Referendums - to study whether a Utah Code subsection, which appears to conflict with THE Utah Constitution regarding referendums, should be amended."

The intent of my presentation is to provide YOU, as committee members, with a foundation to help you better understand this issue.

AFTER my presentation, we will hear from TWO invited presenters who are from DIFFERENT perspectives.

One presenter is a proponent of changing the statute to conform with the Constitution.

The other presenter is from an organization that suggests, if a change is needed, that the constitution be amended to conform with the statute.

Presentation Outline

- Scope – Definitions
- The Problem – a discrepancy
  - Current Constitution
  - Current Statute
- How we got the Problem
  - Constitutional History
  - Statutory History
- Case Law Recognizes Constitutional Provision
- Some Considerations
  - Frequency of Use
  - Signature Requirements to Get Referendum on Ballot
  - How Often may an Election be Held for a Local Referendum
  - What Actions are Referable
- Some Policy Questions

My presentation will cover the following:

- The Scope and some Definitions

- The Problem, which is a discrepancy between the statute and the constitution

- How we got the Problem

- mention a Case that Recognizes the Constitutional Provision

- review some other Considerations

- and finally mention some Policy Questions.

Scope - Definitions

- "Initiative" means a new law proposed by citizens for adoption by the public.
- "Referendum" means a law passed by the Legislature or by a local legislative body that is being submitted to the voters for citizen approval or rejection.
- "Local legislative body" means the legislative body of a county, city, or town.

To define the scope of today's discussion and also to make sure we are all using the same terminology, I will review a few definitions:

- An "Initiative" means a new law proposed by citizens for adoption by the public.

- A "Referendum" means a law passed a local legislative body that is being submitted to the voters for citizen approval or rejection.

The scope of today's agenda item is limited to ONLY Referendum.

More specifically, today's topic is limited to LOCAL referenda, which is a law passed by a "LOCAL legislative body."

- In the context of a Local referendum, a "Local legislative body" means the LEGISLATIVE body of a county, city, or town.

Current Constitution

Article VI, Section 1. [Power vested in Senate, House, and People.]
(1) The Legislative power of the State shall be vested in:
  (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and
  (b) **the people** of the State of Utah as provided in Subsection (2).
(2)
. . .
  (b) The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may:
    . . .
    (ii) require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, **before the law or ordinance may take effect**.

Article VI of the Utah Constitution deals with the Legislative Branch of our government.

Section 1 of Article VI vests the Legislative power of the State in:

a) the state Legislature; and

b) the people.

- Subsection (2) of Section 1 describes the initiative and referendum powers and limitations.

Subsection (2)(b) states: "The legal voters of any county, city, or town, in the numbers, under the conditions, in the manner, and within the time provided by statute, may: . . .

require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect."

This last phrase "before the law or ordinance may take effect" is the FOCUS of today's discussion.

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Current Statute

20A-7-601.   Local Referenda

. . .

(3)

. . .

   (b) The local law **remains in effect until repealed by the voters via referendum**.

(4) If the referendum passes, the local law that was challenged by the referendum is repealed as of the date of the election.

Title 20A, Chapter 7, Part 6 deals with Local Referenda.

- Subsection 601(3)(b) states, "The local law remains in effect until repealed by the voters via referendum."

- Subsection (4) further states, "If the referendum passes, the local law that was challenged by the referendum is repealed as of the date of the election."

This statute is directly opposite from what the constitution states.

In summary, the constitution says that "a law being challenged IS NOT in effect while the referendum is pending."

While the statute says that "a law being challenged IS in effect while the referendum is pending."

Statute has Internal Discrepancies

20A-7-102.   Initiatives and referenda authorized --
   Restrictions.

By following the procedures and requirements of this
   chapter, Utah voters may, subject to the restrictions of
   Article VI, Sec. 1, Utah Constitution and this chapter:

. . .

(3) require any law or ordinance passed by a local
   legislative body to be referred to the voters for their
   approval or rejection **before the law takes effect**.

It is important also to note that the statute currently has some internal discrepancies.

- In Section 20A-7-102 Subsection (3) states, "Utah voters may require any law or ordinance passed by a local legislative body to be referred to the voters for their approval or rejection **before the law takes effect**."

This last phrase is CONSISTENT with the constitution but INCONSISTENT with Section 601 that we just reviewed.

State Referendum

- Statute and Constitution are consistent

- A law being challenged IS NOT in effect while referendum is pending

As a side note, it might be worth mentioning that:

- for a STATE referendum, the statute and constitution are consistent with each other.

- for a STATE referendum, a law being challenged IS NOT in effect while the referendum is pending.

So, the discrepancy problem is ONLY with a LOCAL referendum.

Constitutional History

- 1896 – statehood
- 1900 – initiative and referendum provisions added to constitution
- 1999 – wildlife provision added
- 2001 – mostly technical

Back to a LOCAL Referendum.

You might be asking yourself, "HOW LONG has this discrepancy existed?"

To answer this question, let's first look at the history of the Utah Constitution.

- The Utah Constitution at statehood in 1896 did NOT include initiative nor referendum provisions.

During the 1890s and the early 1900s, as the Populist Movement spread across the country, there was a trend to include initiative and referendum provisions in state constitutions, particularly in the Western states.

- In 1900, Utah was the second state in the nation to add provisions for initiative and referendum to its constitution.

The 1900 amendment to the constitution provided that a law being challenged IS NOT in effect while the referendum is pending.

This provision of "NOT in effect" has been in the constitution since 1900 and has not changed in meaning.

- Article VI, Section 1, has been amended two other times since 1900; but the meaning of this provision has not changed.

Statutory History

- 1917 – Initiative and Referendum statutes enacted
- 1994 – Recodification
- 1994 – SB 102, "Local Initiative and Referenda Amendments"

Now let's look at the statutory history.

- From our research it appears that the initiative and referendum statutes were first enacted in 1917.

This is 17 years after the constitution was changed.

The 1917 legislation did NOT have a discrepancy with the constitution regarding whether or not a law being challenged is in effect while the referendum is pending.

- In 1994, the statute was recodified. The recodification did NOT create the discrepancy.

- Also in 1994, S.B. 102 switched this provision so the statute now had a discrepancy with the constitution.

The statute in question has been amended three times since 1994, but this discrepancy was not changed.

1994 General Session - S.B. 102

1994 – S.B. 102, "Local Initiative and Referenda Amendments"

[(3) When a referendum petition challenging any adopted local law under the authority of Title 10, Chapter 9, Municipal Land Use Development and Management Act, or Title 17, Chapter 27, County Land Use Development and Management Act, is declared sufficient, the local law subject to referendum is null and void until approved by the voters of the county, city, or town.]

(b) The local law remains in effect until repealed by the voters via referendum.

(3) If the referendum passes, the local law that was challenged by the referendum is repealed as of the date of the election.

Shown is the excerpt from the 1994 bill that created the discrepancy between the statute and the constitution.

The bracketed blue text was stricken.

The red text was newly added text.

As you can see in the blue text, the date on which the challenged law was made null and void was the date the petition was declared SUFFICIENT.

If you choose to change the current statute to match the constitution, you will need to decide at what stage in the referendum process the challenged law would be made null and void.

Case Law Recognizes Constitutional Provision

". . . Article VI prevents referable laws from taking effect until local voters have had the opportunity to exercise their right to seek a referendum. In the case at hand, local citizens initiated the referendum process, forestalling the effective date of Ordinance No. 04-05."

Mouty v. Sandy City Recorder, 122 P.3d 521 (UT 2005)

In a 2005 court case commonly known as the Sandy Gravel Pit Case, the Utah Supreme Court DID NOT mention the statute provision; but relied solely on the constitutional provision. The Court said the referendum forestalls the effective date of the ordinance.

Presentation Outline

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- How we got the Problem
  - Constitutional History
  - Statutory History
- Case Law Recognizes Constitutional Provision
- Some Considerations
  - Frequency of Use
  - Signature Requirements to Get Referendum on Ballot
  - How Often may an Election be Held for a Local Referendum
  - What Actions are Referable
- Some Policy Questions

So far in this presentation, we have discussed:

- The Scope;

- The Problem;

- How we got the Problem; and

- mentioned a Case that Recognizes the Constitutional Provision.

- Let's now turn our attention to:

Some Considerations which include:

- Frequency of Use

- Signature Requirements to Get Referendum on Ballot

- How Often may an Election be Held for a Local Referendum

- What Actions are Referable

- and finally to Some Policy Questions

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Frequency of Use

2000 to 2010

- Used in 11 of 29 counties
- Reviewed signatures for 38 local referendums
- 31 of 38 were placed on ballot

To give you a sense of how frequently the local referendum process has been used, we called county clerks to gather some statistics. These statistics are only APPROXIMATE.

- During the last ten years, the local referendum process has been used in about 11 of the 29 counties. (So just under half of the counties.)

- County clerks have reviewed signatures for about 38 different local referendums. On average, that is about four per year.

- Of those 38, it appears that all but seven were declared sufficient for the ballot.

Signature Requirements to Get Referendum on Ballot

Votes Cast for Governor	Signatures Required
more than 25,000	10 %
10,000 to 25,000	12.5 %
2,500 to 10,000	15 %
500 to 2,500	20 %
250 to 500	25 %
less than 250	30 %
if "land use" & larger cities	20 %
if "land use" & smaller cities	35 %

In an effort to weed out frivolous referendums, the statute has some minimum signature requirements.

As you can see from this chart, there is a sliding scale for the number of signatures required based on the size of the municipality or county.

For smaller municipalities and counties the signature requirement is a higher percentage.

If the referendum is regarding "land use" the percentage is even higher.

How Often may an Election be Held for a Local Referendum

- Default election is November
  - Odd year for Municipality
  - Even year for County
- Special Election
  - November for off year
  - June for any year

November = first Tuesday after the first Monday in November
June = fourth Tuesday in June

You might be asking yourself, "How often may an election be held for a local referendum?"

There are two dates per year that a local referendum may be placed on the ballot, in November and in June.

- The default election is in November every two years.

- A municipality or county may call a special election for the other three times in the two-year cycle.

What Actions are Referable?

- Constitution:

  . . . require **any law or ordinance** passed **by the law making body** of the county, city, or town to . . .

The next question is, "What Actions are Referable?" There are TWO reasons I have included this question in my presentation:

FIRST, There are practical considerations of whether the Challenged law should remain in effect or be stayed.

For example, if the law remains in effect and it involves constructing a shopping center, the shopping center may already be built before the referendum election. If the election results turned down the law, would the shopping center really be torn down in order to comply?

On the other hand, there may be a situation similar to a budget that if stayed until after the referendum election, the government would be shut down for many months.

The SECOND reason I have included this question in my presentation, is that there exists a lot of confusion and ambiguity about what actions are referable and what actions are not.

Perhaps the Legislature should specify in statute what actions are referable in an effort to resolve the confusion for the sake of the citizens.

The answer to this question "What Actions are Referable?" has received much debate and is the subject of many court cases.

I will NOT attempt to definitively answer this question.

Rather, I will highlight a few concepts to consider.

- The Utah Constitution uses the words "any law or ordinance" when stating what is subject to referendum.

Also, the Constitution uses the words "passed by the law making body." This phrase "law making body" takes on a different meaning when the municipality or

What Actions are Referable?

- Statute – Section 20A-7-101:

"Local law" includes an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution.

"Local law" does not include an individual property zoning decision.

The statute in the Referendum chapter defines "Local Law" to include "an ordinance, resolution, master plan, and any comprehensive zoning regulation adopted by ordinance or resolution."

The statute further states that "Local law" does not include an individual property zoning decision. Case law supports this exclusion for "individual property zoning decisions."

Forms of Municipal Government

- Both Executive and Legislative Powers
  - Five-member council (includes mayor)
  - Six-member council (includes mayor)

- Separation Powers
  - Council-mayor with five member council
  - Council-mayor with seven member council

In order to explain the next point, I need to briefly review the optional forms of municipal government.

The Utah Code allows FOUR DIFFERENT forms of municipal government.

TWO of these have a SEPARATION of powers between the Mayor and the City Council.

The other TWO forms DO NOT have a separation of powers.

In the five-member and the six-member council forms, the council, which is like a committee, exercises both legislative and executive powers. The mayor is like the chairman of the committee.

Most of the municipalities in Utah, have a council which exercises both executive and legislative powers.

Only a handful have the separation of powers form of government.

Counties follow a similar model with most county commissions exercising both executive and legislative powers.

What Actions are Referable?

- Many decisions made by a city council or county commission are not legislative at all.
- Legislative vs. Administrative Actions
- "What is 'legislative?'" and "What is 'administrative?'" have been litigated in the courts.

We learned from the previous slide that most LOCAL legislative bodies exercise BOTH legislative and executive powers.

Many decisions made by a city council or county commission are not "legislative" at all.

- This leads to the need to distinguish between "Legislative Actions" and "Administrative Actions."

- The question of "What is 'legislative?'" and "What is 'administrative?'" have been litigated in the courts.

Land Use

Legislative Action: A legislative act is a decision made by a public vote of the city council or county commission that results in an ordinance, amendment to an ordinance, adoption of the general plan, amendment to the plan, or creation of an official policy, rule, or code of general community-wide application. Only a body of elected officials can make legislative decisions.

Source: "A Utah Citizen's Guide to LAND USE REGULATION – How it works and how to work it"

To help you get a better feel for what types of actions are Legislative and which actions are Administrative, I will show some examples taken from the context of Land Use.

In the interest of time, the next four slides I will move through very quickly.

At the end of my presentation, I will distribute copies of the slides in my presentation for your further review.

- Land Use practitioners generally agree with this definition of LEGISLATIVE Action.

Land Use

- Administrative Action: When the council, commission, planning commission, board of adjustment, appeals authority, or their staff administrators enforces a legislatively adopted plan, ordinance, rule, or standard, their decisions are not legislative acts. These actions are administrative or quasi-judicial acts.

  Source: "A Utah Citizen's Guide to LAND USE REGULATION – How it works and how to work it"

Land Use practitioners generally agree with this definition of ADMINISTRATIVE Actions.

Land Use

Legislative decisions include:
- Adopting the general plan
- Adopting or amending the zoning ordinance.
- Adopting a subdivision ordinance or any other local law that will be placed in the ordinance book.
- Setting uniform, printed development standards, codes and regulations that are applicable generally to land use within the city, as opposed to a specific development approval for a specific, isolated application.

Source: "A Utah Citizen's Guide to LAND USE REGULATION – How it works and how to work it"

Land Use practitioners generally agree that LEGISLATIVE decisions include those listed in this slide.

Land Use

Administrative decisions include:
* Subdivision approvals,
* Approval of variances
* Decisions interpreting the meaning of the ordinances.
* Appeals from decisions of zoning officials.
* Issuing and enforcing building permits.
* Zoning enforcement.
* Regulation of non-conforming (grandfathered) uses.
* Any other decision that is not made by the legislative body.
* Conditional use permits.
* Site plans
* Any decision, even if made by the legislative body, that decision does not result in a change to the city limits, the ordinances, or code books.

Source: "A Utah Citizen's Guide to LAND USE REGULATION – How it works and how to work it"

Land Use practitioners generally agree that ADMINISTRATIVE decisions include those listed in this slide.

Summary of Presentation

- Scope – Definitions
- The Problem – a discrepancy
  - Current Constitution
  - Current Statute
- How we got the Problem
  - Constitutional History
  - Statutory History
- Case Law Recognizes Constitutional Provision
- Some Considerations
  - Frequency of Use
  - Signature Requirements to Get Referendum on Ballot
  - How Often may an Election be Held for a Local Referendum
  - What Actions are Referable

In summary, this presentation has covered:

- The Scope (Limited to Referendums; Limited to Local);

- The Problem? (discrepancy between statute and constitution);

- How we got the Problem? (statute was changed in 1994; discrepancy has existed ever since);

- mentioned a Case that Recognizes the Constitutional Provision.

- Some considerations which included:

- Frequency of Use (about four times per year)

- Signature Requirements to Get Referendum on Ballot (ranges from 10% to 35% depending on the situation)

- How Often may an Election be Held for a Local Referendum? (twice per year; in June and in November)

- What Actions are Referable?

Some Policy Questions

- Should the statute be changed to be consistent with the constitution?
- Should the constitution be changed to be consistent with statute?
- Should both be changed?
- Should a challenged law be stayed when petition is: 1) qualified for ballot?; or 2) some other time?
- Should the statute specify which actions are 'Legislative Actions' and which actions are 'Administrative Actions'?
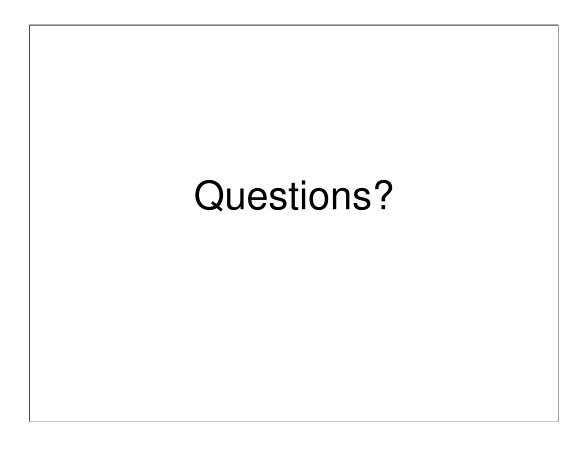
And finally, some policy questions:

Should the statute be changed to be consistent with the constitution?

Should the constitution be changed to be consistent with statute?

Should both be changed?

Should a challenged law be stayed when petition is: 1) qualified for ballot?; or 2) some other time?

Should the statute specify which actions are 'Legislative Actions' and which actions are 'Administrative Actions'?

Questions?

For your reference, I am passing out a copy of this presentation.

I would be happy to answer any questions.

Mr. Chairman, this concludes my presentation.